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REPORT OF THE SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

Written statement*/ submitted by Human Rights Advocates, Inc.,
a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[25 January 2001]

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*/ This written statement is issued, unedited, as received from the submitting non-governmental organization(s).

GE. *200101093*

ENG

The Juvenile Death Penalty is Prohibited by Customary International Law and *Jus Cogens*

1. Human Rights Advocates urges the Commission to support the Sub-Commission's Resolution that the prohibition of the juvenile death penalty is customary international law and to pass a resolution requesting ECOSOC to request the ICJ for an advisory opinion on the international prohibition of juvenile executions. Last year, the Sub-Commission on the Promotion and Protection of Human Rights affirmed that the prohibition of the juvenile death penalty is customary international law. (The death penalty in relation to juvenile offenders, Resolution 2000/17, adopted Aug. 17, 2000. E/CN.4/Sub.2/RES/2000/17 (2000).) The Sub-Commission noted that several Human Rights Commission Resolutions confirm this customary international law: Question of the death penalty, Resolution 1999/61, adopted April 28, 1999, E/CN.4/RES/1999/61 (1999); The question of the death penalty, Resolution 2000/65, adopted April 27, 2000, E/CN.4/RES/2000/65 (2000). Human Rights Advocates (HRA) supports the Sub-Commission's resolution. Furthermore, HRA considers that this customary international law has risen to the level of *jus cogens*. Customary international law prohibiting the juvenile death penalty is comprised of both: 1) state practice, which is evidenced by the long term, wide spread compliance by many nations; and 2) *opinio juris*, in that nation states believe that the law is not merely desired, but mandatory and required by international law. Both state practice and *opinio juris* evidence the customary international law prohibiting the juvenile death penalty.

2. The current practice of nations prohibits the juvenile death penalty. In the past two years, only three countries are known to have executed juveniles, the U.S., Iran, and the Democratic Republic of Congo. In the past three years, only three states in the United States, Texas, Oklahoma and Virginia, have executed juvenile offenders. In the 1999 the Sub-Commission resolution, six countries were mentioned as having executed juvenile offenders since 1990, and include: Islamic Republic of Iran, Nigeria, Pakistan, Saudi Arabia, the United States of America and Yemen. (The death penalty in relation to juvenile offenders, Resolution 1999/4, adopted Aug. 24, 1999. E/CN.4/Sub.2/RES/1999/4 (1999).) Since the Sub-Commission's resolution, four of the six countries mentioned have changed their laws or denied reports of the practice of juvenile executions in their countries. Yemen has passed legislation conforming to international law.[1] In addition, it is reported that Pakistan has also passed legislation to comply with international law.[2] At last years session of the Human Rights Commission, Nigeria stated that the claims of the International Commission of Jurisits that Nigeria had violated international instruments were false because national legislation forbids it. Summary Record of the 6th Mtg. Of the Sub-Comm. on the Promotion and Protection of Human Rights, 56th Sess., paras. 39-40.

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[1] The minimum age of eighteen for the imposition of the death penalty was established in Yemen in October of 1994 with the enactment of a new penal code. Amnesty International, Yemen Ratification without implementation: the state of human rights in Yemen. AI Index, MDE 31/01/97, at 34, 37 *(March 1997).

[2] The San Francisco Chronicle reported that Pakistan, ruled by a military dictatorship, abolished the juvenile death penalty in July of 2000. San Francisco, p4 Sunday Section, 10/8/00. HRA has been unable to verify whether in fact the legislation has been passed.

UN Doc. E/CN.4/Sub.2/2000/SR.6 (Sept. 5, 2000). Similarly, Saudi Arabia delegates claimed at past sessions of the Human Rights Commission that they do not have a juvenile death penalty. Summary Record of the Human Rts. Comm., 56th Sess., paras. 88 and 90, UN Doc. E/CN.4/2000/SR.53 (June 29, 2000).

3. *Opinio juris* is comprised of numerous treaties and pronouncements by international bodies. The following treaties prohibit imposition of the juvenile death penalty: International Covenant on Civil and Political Rights; Convention on the Rights of the Child; Geneva Convention Relative to the Protection of Civilian Persons in Time of War; and American Convention on Human Rights. Also, resolutions by the Sub-Commission on Human Rights, the Commission on Human Rights, the Economic and Social Council and the General Assembly oppose the imposition of the juvenile death penalty.

4. Prohibition of the juvenile death penalty has also risen to the level of *jus cogens*. The Vienna Convention on the Law of Treaties provides that a norm attain *jus cogens* status when it is 1) of general international law; 2) accepted by the States as a whole; 3) immune from derogation; and 4) modifiable only by a new norm of the same status. All of these elements are satisfied with the prohibition against imposing the death penalty on juvenile offenders. First, the prohibition of the juvenile death penalty is general international law because the numerous treaties which prohibit it. Second, prohibition of the juvenile death penalty is accepted by a very large majority of states, even if dissent by a small number of states. In addition to being accepted by the majority of countries, only three countries are known to have practiced the juvenile death penalty in the past three years. This near unanimous acceptance of the prohibition of the juvenile death penalty is clear when compared to the prohibition against torture in international law. While all countries of the world have accepted the prohibition against torture, it has been reported that torture and ill-treatment occurred in over 150 countries from 1997 to mid-2000.[3] Additionally, almost every nation in the world has ratified the Covenant on the Rights of the Child.[4] (Status of the Convention on the Rights of the Child, Report of the Secretary-General, U.N. ESCOR, Hum. Rts. Comm., 59th Sess., Agenda Item 20, para. 2, U.N. Doc. E/CN.4/1998/99 (1997).) Third, the prohibition is non-derogable. Article 4 of the ICCPR states there shall be "no derogation" from Article 6, which prohibits the juvenile death penalty. Fourth, there is no emerging norm that contradicts the current norm. Prohibition of the juvenile death penalty has been universally accepted by all but a few nations. Accordingly, prohibition of the juvenile death penalty is a *jus cogens* norm from which no country is allowed to deviate.

5. An ICJ advisory opinion on the juvenile death penalty will further assist the Commission on Human Rights in its effort to prohibit imposition of the death penalty on juvenile offenders.

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[3] Amnesty International, Launch Report for the 2000 Campaign to Stamp Out Torture, (visited 1/24/01) <www.stoptorture.org:8080/report/body1.htm>

[4] The only nations not to ratify are the United States and Somalia (because there is no government).

For example, the United States, in response to 16 year old offender Michael Domingues' claim that his execution would violate international norms, claimed there was a lack of jurisprudence on whether customary international law or *jus cogens* support prohibition of the juvenile death penalty. Specifically, the United States noted that an ICJ decision on the juvenile death penalty would be helpful to resolve this question.

6. Therefore, the Commission should support the Sub-Commission's resolution on the matter and should request that the Economic and Social Council seek an ICJ advisory opinion on whether imposition of the juvenile death penalty violates customary international law and *jus cogens* norm.

7. Precedent exists for requesting ICJ advisory opinions. In 1989, the Economic and Social Council, pursuant to resolutions passed by the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, requested an ICJ advisory opinion regarding the immunity of Dumitru Mazilu, Special Rapporteur of Sub-Commission on Prevention of Discrimination and Protection of Minorities (1989/75).

8. Also, most recently in 1998, the Economic and Social Council requested an ICJ advisory opinion on the immunity of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights (1998/297).

9. In an effort to abolish the juvenile death penalty, Human Rights Advocates recommends that the commission resolution include a request that the Economic and Social Council seek an International Court of Justice advisory opinion on the juvenile death penalty on whether imposition of the juvenile death penalty violates customary international law and *jus cogens* norm. An ICJ decision would help provide needed jurisprudence on the issue and perhaps prompt governments' compliance with international norms.